

FEDERAL CIRCUIT COURT OF AUSTRALIA

Gupta v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 1646

File number: PEG 257 of 2020

Judgment of: **JUDGE KENDALL**

Date of judgment: 21 July 2021

Catchwords: **MIGRATION** – Partner (subclass 100) visa – decision of the Administrative Appeals Tribunal – whether cl 100.221(4) of the Regulations required the Tribunal to first assess whether there was a spousal relationship prior to the cessation of the relationship due to family violence – jurisdictional error established – writs issued.

Legislation: *Freedom of Information Act 1982*
Migration Act 1958 (Cth), ss 5CB, 5F, 65, 476
Migration Regulations 1994 (Cth), regs 1.15A, 1.23, cll 100.21, 100.22, 100.221, 800.221 of Schedule 2

Cases cited: *AGC17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 887
AlS17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCCA 151
AKQ16 v Minister for Immigration [2019] FCCA 90
Algama v Minister for Immigration & Multicultural Affairs [2001] FCAFC 1884; (2001) 115 FCR 253
Baker v The Queen [1975] AC 774
Collins v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FMCA 571
El Jejeh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1103
Gibbs v Hoama Mining NL [2012] WADC 127
Guyen v Minister for Immigration and Multicultural and Indigenous Affairs and Another [2006] FMCA 311
Hanna v Minister for Immigration and Border Protection [2016] FCA 282
He v MIBP [2017] FCAFC 206
Hossam v Minister for Immigration and Border Protection [2016] FCA 1161
Kaur v Minister for Immigration and Border Protection

[2014] FCA 1251
Kaur v Minister for Immigration and Border Protection
 [2015] HCASL 27
Le v Minister for Immigration [2019] FCCA 3017
Miliangos v George Frank (Textiles) Ltd [1976] AC 443
Minister for Immigration and Border Protection v Truong
 [2016] FCAFC 54
Mulyana v Minister for Immigration [2009] FMCA 691
Mulyana v Minister for Immigration and Citizenship [2010]
 FCAFC 24; (2010) 183 FCR 170
Proctor v Jetway Aviation Pty Ltd [1984] 1 NSWLR 166
Sarina v O'Shannassy (No 2) [2021] FCCA 338
Sharma v Minister for Immigration, Citizenship, Migrant
Services and Multicultural Affairs [2020] FCCA 3372
Singh v Minister for Immigration and Border Protection
 [2021] FCA 480
SZECD [2006] FCA 31; 150 FCR 53
SZGME v Minister for Immigration and Citizenship [2008]
 FCAFC 91
Yang v Minister for Immigration and Border Protection and
Another [2014] FCCA 20

Number of paragraphs:	97
Date of hearing:	28 May 2021
Place:	Perth
Counsel for the Applicant:	Mr H Glenister
Solicitor for the Applicant:	William Gerard Legal Pty Ltd
Counsel for the First Respondent:	Mr P Hannan
Second Respondent:	Submitting appearances save as to costs
Solicitor for the Respondents:	Minter Ellison Lawyers

ORDERS

PEG 257 of 2020

BETWEEN: SEEMA GUPTA
Applicant

AND: MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE KENDALL

DATE OF ORDER: 21 JULY 2021

THE COURT ORDERS THAT:

1. A writ of certiorari issue quashing the decision of the second respondent dated 5 August 2020.
2. A writ of mandamus issue directed to the second respondent requiring it to reconsider and determine the applicant's application for review according to law.

REASONS FOR JUDGMENT

JUDGE KENDALL:

INTRODUCTION

1 This matter relates to an application for judicial review of a decision of the Administrative Appeals Tribunal (the “Tribunal”) dated 5 August 2020. That decision affirmed a decision of a Ministerial delegate (dated 21 June 2018) made under section 65 of the *Migration Act 1958* (Cth) (the “Act”) refusing to grant the applicant a Partner (Migrant) (Class BC) (subclass 100) visa.

2 The applicant is a citizen of India. She first arrived in Australia in 2011 as a dependent on her first husband’s 485 visa (Court Book (“CB”) 39, 1252-1253 & 1438).

3 On 19 October 2013, the applicant and her first husband divorced (CB 37).

4 On 10 December 2014, the Applicant married again (CB 27, 34 & 48).

5 On 27 January 2015, the Applicant left Australia (CB 33, 39, 47-49, 1518, 1520 & 1524).

6 On 30 January 2015, the applicant applied for a Partner (Provisional) (class UF) (subclass 309)/Partner (Migrant) (class BC) (subclass 100) visa (the “provisional visa” and the “permanent” visa respectively) (the “visa”) (CB 18-53).

7 To provide context, the visa that the applicant applied for was a “combined visa”. In effect, the applicant first needed to be granted the provisional visa (a “temporary visa” of sorts). The provisional visa has its own criteria that an applicant must meet. After a period of at least two years since the application was made, an applicant can then be assessed by the Department of Home Affairs (the “Department”) for a permanent visa. This permanent visa, if granted, allows the applicant to remain in Australia indefinitely. A criterion of the permanent visa is, however, that the applicant has held the provisional visa for a period of two years.

8 On 24 May 2016, a delegate of the first respondent (the “Minister”) granted the applicant the provisional visa (CB 984-990).

9 On 18 June 2016, the Applicant returned to Australia as the holder of the provisional visa and lived with her new husband (the “sponsor”) (CB 1128, 1254, 1518 & 1521).

10 On 10 December 2016, the Applicant informed the then Department that her relationship with the sponsor had broken down. That correspondence provided as follows (CB 1044):

Currently I am on partner visa (subclass 309). I wanted to inform the department that my marriage has broken down due to family violence. My husband [omitted] & I have got separated today (10/12/2016). [He] told me in August 2016 that he is transgender but he knew it since a long time. But he never gave me this clue before marriage or when we met. He has given me a bunch of papers in August which shows that he has trapped me in this marriage because of his own benefit. He wanted me to be with him as lesbian. I have been sexually, emotionally, psychologically assaulted. He has threatened me of visa cancellation if we get separated. I can't be in an abusive marriage any more so I have stepped out. If any questions please contact me.

11 On 16 December 2016, the Department asked the applicant to provide further information in relation to her claim of family violence (CB 1046-1063).

12 On 12 January 2017 and 24 January 2017, the applicant's migration agent forwarded supporting evidence to the Department. This included a submission, a statutory declaration, bank statements, receipts, correspondence and call logs, photographs, travel records, legal documents and other relevant supporting material (CB 1076-1158).

13 On 18 April 2017 and 26 April 2017, the applicant's migration agent provided further submissions and supporting documentation in the form of medical reports and other medical records and further statutory declarations (CB 1167-1208).

14 On 11 December 2017, the Department invited the applicant to comment on the following adverse information (CB 1213-1214):

Information has been received by the department which states that you have never been in a committed relationship with your sponsor as the relationship was contrived. The information also states that this arrangement started in 2014 when you had a previous visa decision being assessed at the Migration Review Tribunal, and that you have paid your sponsor more than \$60,000 for this arrangement.

Subclause 100.221(2) of the *Migration Regulations 1994* requires that for the grant of the Subclass 100 visa that you continue to be sponsored by your partner and that you are the spouse or de facto partner of your sponsor, unless, the applicant would meet the requirements of subclause (2) or (2A) except that the relationship between the applicant and the sponsoring partner has ceased; and the applicant has suffered family violence committed by the sponsoring partner. Failure to meet this requirement may result in refusal to grant the Subclass 100 visa and the cessation your Subclass 309 visa. You are invited to comment on the above stated information.

15 On 21 December 2017, the applicant's migration agent provided written submissions, Departmental file notes obtained under the *Freedom of Information Act 1982*, a statutory declaration signed by the applicant, documents from the Migration Review Tribunal (regarding cancellation of the applicant's subclass 457 visa) and a "letter" from the sponsor to

the applicant titled “My Story” (CB 1217-1243). The applicant denied the allegations set out by the Department in the letter referred to above.

- 16 On 16 March 2018, the applicant was advised that the Department had referred her family violence claims to an independent expert for evaluation pursuant to reg 1.23(10)(c) of the *Migration Regulations 1994* (Cth) (the “Regulations”) (CB 1248-1249).
- 17 On 8 May 2018, the independent expert provided a report to the Department. The expert formed the opinion that the applicant had not suffered family violence (CB 1259-1280). The Department invited the applicant to comment on that opinion on 10 May 2018 (CB 1284-1288).
- 18 On 7 June 2018, the applicant’s migration agent provided a response to the expert’s opinion and supporting documents (CB 1289-1399). The agent submitted that the expert had not properly understood the meaning of “relevant family violence” and had overlooked various information and materials.
- 19 On 21 June 2018, a delegate refused to grant the applicant the permanent visa (CB 1405-1408). Although the delegate determined that the applicant and the sponsor had been in a genuine, continuing and exclusive spousal relationship, the applicant did not meet cl 100.221 of the Regulations as the applicant was no longer “the spouse” of the sponsor and she had not been found to have suffered “relevant family violence”.
- 20 On 28 June 2018, the applicant applied for review of the delegate’s decision at the Administrative Appeals Tribunal (the “Tribunal”) (CB 1409-1410).
- 21 On 16 April 2020, the Tribunal invited the applicant to comment upon or respond to information included in the invitation and to provide any further information. The invitation provided (CB 1425-1434):

Invitation to comment on or respond to information

...

The particulars of the information are:

- You made an application for a Partner (Provisional) (Class UF) (Subclass 309) visa and a Partner (Migrant) (Class BC) (Subclass 100) visa on 30 January 2015. You were subsequently granted a Partner (Provisional) (Class UF) (Subclass 309) visa on 24 May 2016.
- It is a requirement for the grant of both visas that you were the spouse or de facto partner, as those terms are defined in section 5F and section 5CB of the

Migration Act 1958 respectively, of your sponsoring partner at the time of the visa application. Further, it is a requirement for grant of the visas that you continue to be the spouse or de facto partner of your sponsoring partner at the time of decision, unless one of the specified exceptions to that requirement applies.

Information of the file of the Department of Home Affairs indicates that your relationship with the sponsoring partner has ended.

This information is relevant because the Tribunal may conclude that at the time of its decision that you are no longer the spouse or de facto partner of your sponsoring partner. If the Tribunal is not satisfied that you are the spouse or de facto partner of your sponsoring partner, and if you do not meet any of the alternative criteria for grant of the visa, the Tribunal may conclude that you do not meet this requirement for the grant of the visa for which you have applied. The Tribunal may then affirm the decision under review.

Invitation to provide information

You are also invited to provide the following information in writing.

If you are no longer in a relationship with your sponsoring partner, there are exceptions to the requirement that you continue to be the spouse or de facto partner of your sponsoring partner at the time of decision. These include:

- The death of the sponsoring partner
- Family violence
- Certain court orders or responsibilities in relation to children

The specific requirements for each of these exceptions are contained in clauses 100.221 (2), (3) and (4) of Schedule 2 to the Migration Regulations 1994 (which clauses are extracted in an attachment to this letter for your information).

The Tribunal invites you to provide information that you believe may be relevant to these exceptions.

22 On 29 April 2020, the applicant's representative responded to the invitation to comment (CB 1441-1444).

23 The applicant attended a hearing before the Tribunal on 9 June 2020 (CB 1464-1467).

24 On 10 July 2020, the applicant's representative provided further written submissions, supporting documents and a statutory declaration signed by the applicant (CB 1482-1508).

25 On 5 August 2020, the Tribunal affirmed the delegate's decision not to grant the applicant the visa (CB 1516-1529). Unlike the delegate, the Tribunal determined that the applicant and her sponsor did not have a mutual commitment to a shared life together to the exclusion of all others. The Tribunal was not satisfied that the parties had a commitment to a genuine and continuing relationship.

26 On that basis, the Tribunal determined that it was not satisfied that the requirements of s 5F(2) of the Act were met at the time of its decision and that, as such, the applicant did not meet the requirements of cl.100.221 of the Regulations. Further, the Tribunal determined that, as the applicant did not meet this criteria, it followed that she could not meet the exclusion criteria set out in clause 100.221(4) of the Regulations. As such, the Tribunal did not go on to consider the applicant's family violence claims.

27 On 2 September 2020, the applicant applied to this Court for judicial review of the Tribunal's decision. The application is brought pursuant to s 476 of the Act. To obtain assistance from this Court, the applicant must show jurisdictional error on the part of the Tribunal. As will be discussed in detail below, it is the Tribunal's latter determination (ie, the Tribunal's determination that it did not, in the circumstances, need to consider the applicant's family violence claims) that is the focus of the application for judicial review before this Court.

TRIBUNAL'S DECISION

28 The Tribunal's decision is 14 pages long and spans 77 paragraphs.

29 The Tribunal began by identifying the type of visa under review, summarising the legislative criteria, outlining why the delegate refused the visa and confirming that the applicant had appeared before the Tribunal:

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 21 June 2018 to refuse to grant the applicant a Partner (Migrant) (Class BC) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 30 January 2015 on the basis of her relationship with her sponsor. At that time, Class BC contained Subclass 100. The criteria for the grant of this visa are set out in Part 100 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.100.221 which requires the applicant to be the spouse or de facto partner of the sponsor, unless the relationship has ceased and certain circumstances exist. These include that the applicant, or a member of the family unit, has suffered family violence committed by the sponsor: cl.100.221(4)(b), (c)(i). The applicant claims this occurred in this case.
4. The delegate refused to grant the visa on the basis that the applicant did not meet cl.100.221 because the relationship between the applicant and the sponsoring partner had ceased and the delegate was not satisfied that the cessation of the relationship was the result of family or domestic violence.

30 The Tribunal confirmed that it had before it the delegate's decision and the Departmental and Tribunal files (at [7]-[8]).

31 The Tribunal then referred to the applicant's previous marriage (ie, prior to marrying the sponsor) and noted as follows:

- (a) that marriage was arranged and the applicant arrived in Australia in 2011 as a dependent on her ex-husband's visa (at [9]);
- (b) the applicant's visa was cancelled in June 2012 after her ex-husband advised the Department that the marriage had broken down (at [9]). The applicant appealed that cancellation decision to the Tribunal (unsuccessfully) and also sought Ministerial Intervention (at [10]); and
- (c) the applicant claimed that her marriage to her ex-husband had broken down due to domestic violence but had provided no evidence in this regard (at [11]).

32 The Tribunal explained that the applicant met her new husband, the sponsor, through a dating site on 12 October 2014. The couple were engaged on 2 November 2014 and married on 10 December 2014. The Tribunal noted that the applicant then left Australia in January 2015 but that she and the sponsor saw each other three times over the following year (at [12]). The applicant then returned to Australia as the holder of the provisional visa in June 2016 (at [13]).

33 The Tribunal explained that in a statement to the Department made on 12 January 2017, the applicant did not mention or allude to any family or domestic violence. Rather, "she portray[ed] a relatively ideal marriage". The Tribunal noted that when the Tribunal put this to the applicant, she said that she "had understood that the department had wanted an account of their marriage and not any other aspect" (at [14]).

34 The Tribunal then noted:

- 15. The applicant lodged an application with the department for a grant of her visa on the basis that the marriage ended as a result of family violence. The department accepted that there was a genuine relationship between the parties at the time of the alleged violence and sought evidence from the applicant to support the claim.
- 16. In a separate statement dated 12 April 2017 the applicant made the following claims.
 - a. In August 2016 the sponsor told her that he was transgender and hoped to transition to a female in the coming years. The sponsor

provided the applicant with an undated letter setting out his plans. The applicant claims that she was shocked by this revelation and afraid of what would happen to her marriage and what her family would think. She claims that she suffered an emotional breakdown during this period.

- b. The applicant claimed that she suffered emotional and verbal abuse and financial abuse. She also claimed physical, and sexual abuse and psychological and emotional abuse.

- 17. The applicant provided a number of documents and statements to the department of immigration to support her claims which the department referred to an Independent Expert for opinion on whether the applicant had suffered family violence. The IE Report concluded that the applicant had not suffered family violence. The findings of the report were put to the applicant for comment which the applicant did in some detail. The department went on to accept the IE report and refused the application.

35 The Tribunal then explained that the applicant had claimed that her relationship with the sponsor had been genuine and continuing but that it ended because of family violence (at [18]).

36 The Tribunal continued:

- 19. Before considering the claimed incidence of family violence, the Tribunal is required to consider whether the required partner relationship existed before the claimed family violence. The Tribunal notes in this regard that the delegate was satisfied that the applicant and the sponsor were in the required relationship at the time of the alleged violence. The Tribunal put the applicant on notice that it was not bound to the delegate's finding and would have to come to its own view.
- 20. The Tribunal is required to form a view about the nature of the parties relationship because all partner visa family violence criteria contain a requirement that 'the relationship between the applicant and the sponsoring partner has ceased'. The relevant partner relationship (i.e. spouse or de facto, as defined in the legislation) must therefore have existed before it can be determined that the relationship 'has ceased'. If the Tribunal is not so satisfied, the family violence exception to the continuing relationship requirement will not be available.
- 21. This may be explained by reference to the actual legislative provisions. For example, the family violence exception in clause 100.221(4) appears as follows:
 - (b) the applicant **would meet the requirements of subclause (2) or (2A) except** that the **relationship** between the applicant and the sponsoring spouse has ceased; and
 - (c) after the applicant first entered Australia as the holder of the [subclass 309 visa] .. - either or both of the following circumstances applies:
 - (i) either or both of the following:

- (A) the applicant;
- (B) a member of the family unit of the sponsoring spouse or of the applicant or of both of them;

has suffered family violence committed by the sponsoring spouse

- 22. Subclauses (2) and (2A) in cl 100.221 each include the requirement that the applicant ‘is the spouse or de facto partner of the sponsoring partner’. Therefore, when read as a whole, the requirement is that the applicant would have met the requirement of being the partner of the sponsoring partner, except that the relationship has ceased and the applicant or relevant person has suffered family violence. This means that, the relationship which has ceased must be one which would have (but for ceasing) met the requirements of the relevant legislation.
- 23. The Tribunal put to the applicant a number of significant concerns with her evidence and account of her relationship with the sponsor and sought a written response to those concerns. The applicant, through her representative, responded to those concerns comprehensively in a submission received on 10 July 2020. The Tribunal has included those responses, where relevant, to its consideration of claims and findings below.

37 The Tribunal then detailed what had occurred at the Tribunal hearing. The Tribunal noted that:

- 0 it put to the applicant the fact that it had some difficulties forming a concluded view about the genuineness of her marriage in light of its “rapid inception and development” (at [24]);
- 1 it discussed the applicant’s first marriage and asked the applicant whether she had deliberately set out to find an Australian resident husband. The applicant responded that she and her sister had met the ex-husband, their families agreed to the marriage and it was not her intention to find an Australian husband (at [25]);
- 2 the applicant’s evidence was that her ex-husband was very controlling and that he made her feel bad about herself. She moved away for a short period but then returned (at [26]). When she returned , the ex-husband “slapped her” and she “took out an intervention order” (at [27]);
- 3 the applicant did not seek any psychological or other help (at [27]). When asked why she did not return to India after the marriage, the applicant explained that no one “accepts” divorce in India. She further explained that her ex-husband had told people that she had stolen money from him. Further, the applicant’s family only accepted her when she returned following her marriage to the sponsor because she was married again (at [28]);

- 4 there was evidence that the applicant married again because her family wanted her to settle down and “she wanted to find a good man” (at [29]);
- 5 it had put to the applicant that she accepted a marriage proposal from the sponsor within a few weeks of meeting him and asked her how she could make a judgement that the sponsor “was not a man that would also treat her badly, lie to her and control her in the same way that her previous husband had done”. The applicant responded that she found the sponsor to be “a good man” and it did not take them a lot of time to fall in love (at [30]);
- 6 in written submissions provided after the hearing, the applicant stated that she had joined eHarmony as it had more men who were not Indian and would be okay with divorce (at [32]);
- 7 the applicant stated that (in her culture and family) it is not permitted for a woman to live with a man without first being married and “the sponsor respected that” which is why they opted to marry “quickly”. Further, the applicant maintained that the marriage and the visa “were two separate things” (at [32]);
- 8 the sponsor’s uncle had provided them with the funds for the visa (at [34]);
- 9 the sponsor had organised a surprise party for the applicant when she returned from India, after being granted the provisional visa (at [35]);
- 10 it put it to the applicant that on 12 January 2017 she did not mention or allude to any family or domestic violence and noted that she had explained that she thought she was being asked to provide an account of the genuineness of the marriage and not any other aspect (at [36]);
- 11 on the applicant’s evidence, problems began in the marriage in June 2016 as the sponsor “was upset about how long the visa was taking”. Further, in August, the sponsor gave the applicant a letter “which set out his desire to [be] transgender”. This “shocked” the applicant (at [37]). The Tribunal then noted that the applicant had stated that the sponsor “expected her to become a lesbian” (at [38]);
- 12 it had put it to the applicant that the letter seemed to be “a genuine and gentle explanation” of what the sponsor was going through. The letter “expresse[d] a hope” that the applicant “accept[ed] his transition” but made no demand or expectation for her to do so. The letter also considered the possibility that they would separate. The

- Tribunal found that the sponsor was not motivated by any other concerns when drafting the letter and put weight on its content (at [38]);
- 13 it had asked the applicant what happened when the sponsor returned home and noted that the applicant had explained that the sponsor tried to convince her to “deal with it”, she had googled what the term “transgender” meant and she “hoped that it was a choice that he could change” (at [39]);
- 14 it asked the applicant why she did not leave the marriage immediately as it was something “completely unacceptable to her” and noted that the applicant responded by asking how she could end a second marriage and stating that she wanted to save the marriage (at [40]);
- 15 it had questioned the applicant about the alleged family violence and the applicant responded that on one occasion the sponsor “forcefully took her to the bedroom” and though “she told him she didn’t want to have sex”, the sponsor “didn’t listen and proceeded to have sex with her”. Further, she explained that, after this incident, she went to stay with her sister for a few days. When asked by the Tribunal why she did not remain with her sister, the applicant stated that she did not want the marriage to end (at [41]);
- 16 the applicant explained further that after this incident she moved into the spare bedroom and remained there until the marriage ended in December. The Tribunal then noted that it had put it to the applicant that she had previously taken out a restraining order because “her ex-husband slapped her in the face” and that, in the circumstances, it “was surprising that she did not take out a restraining order”. The applicant responded that she was “completely lost and confused” (at [42]);
- 17 “the applicant did not mention the alleged sexual assault to the psychologist whom she had been seeing for several months from early October until three months after the separation” (at [42]);
- 18 in her post-hearing submissions (with included research), the applicant cited cultural reasons for remaining with the sponsor (even after the alleged rape) and explained that she was committed to making the relationship work “at all costs” because she could not face going back to India with two failed marriages (at [43]);
- 19 consistent in the applicant’s evidence was an assertion that she did not want to go back to India (at [44]); and,

20 it was concerned about the late reporting of the sexual assault but noted the applicant's response that she was confused and traumatised. The Tribunal also noted that the applicant had consented to some sexual acts in the past and was embarrassed about her behaviour – such that she did not feel able to discuss the sexual assault with her psychologist until several months after she began consulting with her (at [45]).

38 The Tribunal determined that the applicant's claim that the sponsor relied on her fear of returning to India to coerce her into accepting the sponsor's new identity was not borne out by the evidence and that it seemed that the sponsor had no intention of coercing the applicant to do or accept anything (at [46]).

39 The Tribunal also determined that the applicant's claims that the sponsor used her visa status to blackmail her was also contrary to the evidence as it was the applicant who reported the end of the marriage – not the sponsor – and, if the sponsor had wanted to coerce the applicant as she claimed, the sponsor would have initiated the cancellation of the applicant's visa.

40 The Tribunal also noted that the matter had been referred to an independent expert by the delegate and that the delegate had determined that the applicant did not fear remaining in the relationship (at [47]).

41 The Tribunal then noted that the issue in the present case was “whether the applicant and the sponsor were in a genuine, continuing and exclusive spousal relationship at the time the marriage ceased as a result of alleged family or domestic violence” (at [48]).

42 Importantly, for the purposes of the application for judicial review now before this Court (discussed in detail below), the Tribunal continued:

Whether the parties are in a spouse or de facto relationship

49. Clause 100.221 requires that the applicant meet one of five alternative requirements. These include cl.100.221(2) and (2A) which require, among other things, that at the time of this decision, the applicant is the spouse or de facto partner of the ‘sponsoring partner’. Unless the applicant was granted a Subclass 309 visa by Ministerial intervention, the ‘sponsoring partner’ is the person who was specified as the applicant's spouse or de facto partner or intended spouse or de facto partner in the related Subclass 309 application, being an Australian citizen, permanent resident or eligible New Zealand citizen.

50. In the present case the applicant claims that she and the sponsoring spouse were in a genuine continuing and exclusive spousal relationship and that relationship ended as a result of family/domestic violence.

51. ‘Spouse’ is defined in s.5F of the Act and provides that a person is the spouse

of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

- 43 The Tribunal found that the applicant and the sponsor were validly married as required by s 5F of the Act (at [52]). The Tribunal then considered the financial aspects of the relationship (at [53]). It noted that the financial arrangements for the couple were not well developed (at [54]). It also noted that the applicant had provided joint bank statements showing fortnightly savings transfers but that the applicant and the sponsor each had their own accounts and “appeared to be responsible for their own expenses” (at [55]). The Tribunal also noted that the applicant made the sponsor a beneficiary of her superannuation and she was a beneficiary of the sponsor’s will (at [56]).
- 44 The Tribunal then considered the “nature of the household” (at [57]). It noted that the couple had lived together for approximately 7 months and, when they were apart, kept in daily contact (at [58]).
- 45 The Tribunal then considered the “social aspects of the relationship” (at [59]). The Tribunal accepted that the couple spent time together overseas and that they presented themselves as a married couple (at [60]).
- 46 The Tribunal then considered the “nature of the couple’s commitment to one another” (at [61]).
- 47 The Tribunal noted that the couple met and married within two months. This caused significant concern for the Tribunal. The Tribunal found the applicant’s explanation (cultural issues) to be unconvincing (at [62]). The Tribunal considered it more plausible that the “swift marriage” was aimed at ensuring that the applicant could return to Australia as the spouse of an Australian citizen and thus secure a positive migration outcome – something she had been seeking for nine years (at [63]).
- 48 The Tribunal found it unlikely that the applicant, having suffered alleged domestic violence from her ex-husband (who she had not met prior to their marriage) would again rush into

another marriage with a man she had known for only a few weeks. The Tribunal considered that the impetus behind both marriages appeared to have been from the applicant's sister who seemed committed to trying to ensure that the applicant was able to remain in Australia (at [64]).

49 The Tribunal also found that the applicant and the sponsor knew very little of each other and that, given more time, the sponsor's intentions may have been clearer (at [65]). The Tribunal explained that the sponsor appeared to have recognised that he was transgender well before he met the applicant and before he married her. This, the Tribunal noted, "threw into question" the nature of the sponsor's "commitment to a long-term marriage to the applicant and whether or not such a deceit renders all reasonable notion of a mutual commitment null and void" (at [66]). The Tribunal noted that in his letter to the applicant, the sponsor appeared to be resigned to the fact that the applicant would not want to continue in a married relationship with him (as a transgender woman) (at [67]).

50 The Tribunal continued:

68. In the context of the rapid inception and development of their relationship a few short weeks before she was required to depart Australia and the short period of time they actually lived together, the Tribunal is not persuaded that the parties had a mutual commitment to a shared life together to the exclusion of all others as envisaged by the Migration Act

51 The Tribunal noted that the applicant's "consistent and persistent statements" in relation to her fear of returning to India, of not wanting to return to India and of wanting to kill herself (rather than return to India) had little to do with the breakdown of the marriage but were, instead, a result of her realisation that she would no longer be permitted to remain in Australia (at [69]).

52 The Tribunal also noted that the applicant had "made strenuous efforts to remain in Australia" and determined that the applicant's pursuit of various migration outcomes was so that she could have "more time in Australia to find an Australian husband" (at [70]).

53 Importantly, the Tribunal then concluded (emphasis added):

71. Having considered the evidence and weighed all aspects of the circumstances of the applicant, the Tribunal has formed a view that the applicant married the sponsor with the sole aim of obtaining a migration outcome to remain in Australia. They lived together for only a short period of time and developed no strong financial ties or developed plans for a future together. The sponsor's commitment to the marriage is also called into question on the basis of his failure to declare his desire to transition to a woman. The motives

and intentions of both parties are not consistent with having a mutual commitment to a shared life together.

72. Equally, the sponsor's deception calls into question not only his commitment to the marriage but whether such a deception can meet the threshold of being a "genuine" relationship in the sense that it is neither a sham nor a false relationship. Whilst the sponsor expressed a hope that the applicant would remain with him in a relationship once he disclosed his desire to transition, it's clear that he had no expectation that she would. It's unreasonable to think that he could have, or would have, formed a strong view that the applicant, a conservative, deeply religious Hindu woman would remain with him as a woman.
73. In the tribunal's mind, therefore, for the reasons above, the Tribunal is not satisfied the parties had a mutual commitment to a shared life together to the exclusion of all others. The Tribunal is not satisfied that the parties had a commitment to a genuine and continuing relationship and the Tribunal is not satisfied that the parties do not live separately and apart on a permanent basis at the time of this decision.
74. Given these findings the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore the applicant does not meet the requirements of cl.100.221. **As the applicant does not meet this criterion it follows that she cannot meet the exclusion criteria in clause 100.221(4) and the Tribunal has not gone on to consider the applicant's domestic/family violence claims.**

54 On the basis of the above, albeit for different reasons, the Tribunal affirmed the delegate's decision not to grant the applicant the permanent visa (at [76]-[77]).

PROCEEDINGS IN THIS COURT

55 The applicant, with leave of the Court, filed an amended application for judicial review with this Court on 26 May 2021.

56 That amended application contained 1 particularised ground of review as follows:

- A. The Second Respondent (**Tribunal**) made a jurisdictional error by failing to complete its statutory task, in that it misconstrued the criterion for the grant of a Partner (Subclass 100) visa set out in cl 100.221(4) of Sch 2 of the Migration Regulations 1994, and thereby failed to consider whether the Applicant satisfied that criterion for the grant of the visa.

Particulars

- a. The Tribunal misconstrued the criterion in that it considered that it had to be satisfied that a spousal relationship existed prior to the occurrence of any claimed family violence (Tribunal's reasons (**R**) [19]-[22]).
- b. The criterion does not require the Tribunal to be satisfied that a spousal relationship existed prior to the occurrence of any claimed family violence (see *El Jejeh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA

1103 at [202]-[208] applied in *Sharma v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 3372).

- c. The Tribunal failed to consider whether the Applicant suffered family violence committed by the sponsoring partner and accordingly whether the Applicant satisfied the criterion (R [74]).

CONSIDERATION

Legislative provisions

57 Relevantly, clause 100.221 of the Regulations provides:

100.22—Criteria to be satisfied at time of decision

100.221

- (1) The applicant meets the requirements of subclause (2), (2A), (3), (4) or (4A).
 - (2) The applicant meets the requirements of this subclause if:
 - (a) the applicant is the holder of a Subclass 309 (Partner (Provisional)) visa; and
 - (b) the applicant is the spouse or de facto partner of the sponsoring partner; and
 - (c) subject to subclauses (5), (6) and (7), at least 2 years have passed since the application was made.
 - ...
 - (4) The applicant meets the requirements of this subclause if:
 - (a) the applicant first entered Australia as the holder of a Subclass 309 (Partner (Provisional)) visa and continues to be the holder of that visa; and
 - (b) the applicant would meet the requirements of subclause (2) or (2A) except that the relationship between the applicant and the sponsoring partner has ceased; and
 - (c) after the applicant first entered Australia as the holder of the visa mentioned in paragraph (a)—either or both of the following circumstances applies:
 - (i) either or both of the following:
 - (A) the applicant;
 - (B) a member of the family unit of the sponsoring partner or of the applicant or of both of them;
- has suffered family violence committed by the sponsoring partner;

...

The Tribunal's approach

58 The Tribunal's approach to determining if the applicant met cl 100.221(4) of the Regulations was as follows:

19. Before considering the claimed incidence of family violence, the Tribunal is required to consider whether the required partner relationship existed before the claimed family violence. The Tribunal notes in this regard that the delegate was satisfied that the applicant and the sponsor were in the required relationship at the time of the alleged violence. The Tribunal put the applicant on notice that it was not bound to the delegate's finding and would have to come to its own view.
20. The Tribunal is required to form a view about the nature of the parties relationship because all partner visa family violence criteria contain a requirement that 'the relationship between the applicant and the sponsoring partner has ceased'. The relevant partner relationship (i.e. spouse or de facto, as defined in the legislation) must therefore have existed before it can be determined that the relationship 'has ceased'. If the Tribunal is not so satisfied, the family violence exception to the continuing relationship requirement will not be available.
21. This may be explained by reference to the actual legislative provisions. For example, the family violence exception in clause 100.221(4) appears as follows:
 - (b) the applicant **would meet the requirements of subclause (2) or (2A) except** that the **relationship** between the applicant and the sponsoring spouse has ceased; and
 - (c) after the applicant first entered Australia as the holder of the [subclass 309 visa] .. - either or both of the following circumstances applies:
 - (i) either or both of the following:
 - (A) the applicant;
 - (B) a member of the family unit of the sponsoring spouse or of the applicant or of both of them;has suffered family violence committed by the sponsoring spouse
22. Subclauses (2) and (2A) in cl 100.221 each include the requirement that the applicant 'is the spouse or de facto partner of the sponsoring partner'. Therefore, when read as a whole, the requirement is that the applicant would have met the requirement of being the partner of the sponsoring partner, except that the relationship has ceased and the applicant or relevant person has suffered family violence. This means that, the relationship which has ceased must be one which would have (but for ceasing) met the requirements of the relevant legislation.

Parties' submissions

- 59 The applicant was represented before this Court by Mr Glenister. The Minister was represented by Mr Hannan. The parties filed lengthy submissions in relation to the issue before this Court. The applicant filed written submissions on 6 May 2021. The Minister then filed detailed written submissions on 24 May 2021. The applicant then filed reply submissions on 26 May 2021. Both parties, in their oral submissions, clarified their positions.
- 60 The Court thanks Mr Hannan and Mr Glenister for their considerable assistance and notes the very high quality of their written and oral advocacy. The Court appreciates, in particular, the willingness on the part of both lawyers to cooperate and guide the Court through what proved to be complex jurisprudence. It is noted, for example, that the Minister's written submissions were filed late and the applicant did not have leave to file submissions in reply. Neither lawyer raised concerns with these oversights, focussing instead on the task at hand (transcript at page 14). Both lawyers effectively and forensically addressed each other's written submissions in Court. Others would do well to emulate their efforts in this regard.
- 61 The parties agree that the sole question before this Court is whether cl 100.221(4)(b) of the Regulations requires a decision maker (here, the Tribunal) to first assess whether there was a genuine spousal relationship prior to the cessation of the relationship due to family violence. Here, the Tribunal determined that if it first concluded that the relationship in question was not "genuine", then the Act and Regulations do *not* require it to address any claims of family violence.
- 62 The applicant argues that, applying the recent decision of Wigney J in *El Jejeh v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs* [2020] FCA 1103 ("*El Jejeh*"), the Tribunal adopted the incorrect approach and should have addressed the applicant's claims of domestic violence and made findings regarding those claims. In failing to do so, it is argued, the Tribunal misconstrued the requirements of cl 100.221(4) of the Regulations. *El Jejeh*, it is stressed, is the "last judgment by an intermediate appellate court on the subject matter of this application" (applicant's reply submissions at [19]) and is, as such, binding.
- 63 The Minister argues that the Tribunal's approach was correct and that the Court should, for a number of reasons outlined below, *not* follow the decision of Wigney J in *El Jejeh*. In his oral submissions, Mr Hannan submitted that the "final word, in [his] submission is *Singh*",

referencing the decision of Besanko J in *Singh v Minister for Immigration and Border Protection* [2021] FCA 480 (“*Singh*”).

64 While this Court does not normally repeat the parties’ written submissions in detail, the submissions here were, as noted above, clear and particularly useful in relation to the relevant jurisprudence. As such, they merit repeating here.

Minister’s Submissions

65 The Minister’s written submissions (at [54] to [68]) can be summarised as follows:

- The relevant parts of *El Jejeh* are found at [3], [9] & [202]–[207], as follows:

3 If that were not enough, it would also appear that the Tribunal misconstrued the relevant visa criterion and, as a result, declined to complete the exercise of its review jurisdiction. This was not, however, an issue that was raised or addressed before the primary judge in the Circuit Court.

9 Equally surprising was the fact that, while up to this point the matter had appeared to proceed on the basis that Mr El Jejeh had been Ms Maarabani’s spouse for at least some period of time, but that the relationship had broken down by the time the visa decision was to be made, the Tribunal found, for reasons that were almost entirely unexplained, that the two had never been in a genuine spousal relationship. The Tribunal gave no hint to Mr El Jejeh that this was likely to be an issue in the review. Even putting that issue to one side, the effect of this finding, at least according to the Tribunal, was that it did not need to determine Mr El Jejeh’s claim that he had suffered “family violence” committed by Ms Maarabani. That circumstance, if it was found to have existed, may have meant that Mr El Jejeh satisfied the relevant visa criteria even though his relationship with Ms Maarabani had come to an end.

202 This ground of appeal raises an issue that was not ventilated before the primary judge. Mr El Jejeh was given leave to raise it on appeal notwithstanding. It hinges on the proper construction of the criterion in cl 100.221(4) of Sch 2 to the Regulations.

203 The relevant criteria for the grant of a Subclass 100 visa were outlined earlier in these reasons. One way that Mr El Jejeh was able to meet the criteria was to establish that he: was the holder of a Subclass 309 visa; was the spouse of his sponsoring partner; and two years had passed since he applied for the visa: cl 100.221(2) Another way he was able to meet the criteria was to establish that he: first entered Australia as the holder of a Subclass 309 visa; continued to hold that visa; would meet the requirements of cl 100.221(2) except that the relationship between him and his sponsoring partner had ceased; and he had suffered family violence committed by the sponsoring partner: cl 100.221(4).

- 204 It was tolerably clear that Mr El Jejieh was pursuing his review application before the Tribunal on the basis of cl 100.221(4). He had provided material to the Tribunal which included claims that he had suffered family violence committed by Ms Maarabani. The Tribunal was aware of those claims and asked Mr El Jejieh about them during the hearing. The Tribunal, however, made no findings concerning those claims. It found that it did not need to make any such findings because it found that there had never been a genuine spousal relationship between Mr El Jejieh and Ms Maarabani. In so finding, the Tribunal misconstrued the requirements of cl 100.221(4) and, as a result, failed to complete the exercise of its review jurisdiction.
- 205 The requirements of cl 100.221(4) have just been set out. They do not include a requirement that the applicant demonstrate that the applicant's relationship with his or her sponsoring partner was a genuine relationship. The applicant does have to establish that he or she entered Australia as the holder of a subclass 309 visa and continued to hold that visa. A criterion for the grant of a subclass 309 visa is that the applicant was, at the time of application and decision, a spouse of, relevantly, an Australian citizen. Thus, if the applicant establishes that he or she held a Subclass 309 visa at the time they entered Australia and continued to hold that visa, in a sense that demonstrates that they were the spouse of an Australian citizen. But they do not need to demonstrate that fact separately. They need only demonstrate that they held and continue to hold a Subclass 309 visa.
- 206 It might perhaps be argued that the requirement, in cl 100.221(4)(b), which involves the cessation of the relationship between the applicant and the sponsoring partner, implies that there was a relationship in the first place. For the reasons already given, however, the relevant requirement in cl 100.221(4) is that the applicant held and continued to hold a Subclass 309 visa, not that there was a relationship. It might perhaps be added, in this context, that if the Minister became aware of information that suggested that the applicant for a Subclass 100 visa who held a Subclass 309 visa was never in a genuine relationship with his or her spouse, it would most likely be open to the Minister to cancel the applicant's Subclass 309 visa. It would then follow that the applicant would not meet the criteria for the grant of a Subclass 100 visa. That did not, however, occur in this case.
- 207 Mr El Jejieh entered Australia as the holder of a Subclass 309 visa and continued to hold that visa at the time of his review application. While his relationship with Ms Maarabani had ceased by that time, he claimed that he met cl 100.221(4) because he suffered family violence committed by Ms Maarabani. The Tribunal was required to consider that claim. Its failure to do so was amounted to a failure of it to exercise its review jurisdiction.
- The gist of Wigney J's reasoning is (in effect) that the Minister (and thereby the Tribunal) is obliged to consider family violence issues so long as, but without more, the applicant for the Partner Visa holds a subclass 309 visa. See [206].
 - That proposition is contrary to previous single judge decisions of the Federal

Court which are authority for the proposition that the decision-maker need not consider family violence issues if the decision-maker is not satisfied that a genuine spousal relationship existed between the visa applicant and the sponsor at the time of the visa application.

- In this regard, the Minister notes the decision in *Kaur v Minister for Immigration and Border Protection* [2014] FCA 1251 (**Kaur**) at [43]–[44] per Murphy J, as follows:

43. As I have said, the Tribunal was not satisfied that the appellant and her sponsor were in a genuine spousal relationship at the time of the visa application. I consider that the Tribunal was not obliged to consider the issue of family violence: see *Alsalem* at [17]; *Yang v Minister for Immigration and Border Protection and Another* [2014] FCCA 20 at [28]–[36]; *Guyen v Minister for Immigration and Multicultural and Indigenous Affairs and Another* [2006] FMCA 311 at [24]–[25]; *Collins v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FMCA 571 at [42].

44. In the context of an application for a partner visa there is little utility in considering the issue of family violence unless a spousal relationship for the purposes of 820.211(2) is first established. As the Tribunal found that the appellant failed to establish the necessary relationship at the time of the visa application, there was no requirement for it to assess the issue of family violence.

- The Minister also notes the decision in *Hanna v Minister for Immigration and Border Protection* [2016] FCA 282 (**Hanna**) at [23] per Jagot J, as follows:

23. As explained at [52]–[55] of the reasons of the primary judge, and as the Tribunal explained to the appellant during the oral hearing before it, the family violence exception is only engaged where the decision-maker is satisfied that a spousal or de facto relationship within the meaning of s 5F of the Act existed between the sponsor and the visa applicant before the relationship ceased. The Tribunal found that no such relationship existed at any time, with the consequence that the question of family violence did not arise for consideration (as in *Kaur v Minister for Immigration and Border Protection* [2014] FCA 1251 at [43]–[44]). The primary judge’s conclusion to this effect at [54]–[55] is correct.

- The Minister also notes the decision in *Hossam v Minister for Immigration and Border Protection* [2016] FCA 1161 (**Hossam**) at [24] per Perry J, as follows:

24. In those circumstances, the Tribunal was not satisfied that the appellant was in a spousal relationship pursuant to reg 1.15A of the Regulations at the time of his application, and therefore the appellant did not meet cl 820.211(2)(a) and s 5F(2) of the Act (at [19]). The Tribunal also observed with respect to his claim to have suffered family violence that to meet the criterion in cl 820.221(3)(a), a positive finding was required that he was the spouse of the sponsoring partner at the time of application and would have continued to the time of decision save that the relationship has ended and family violence has occurred (at [21]). As the Tribunal had found

that no such relationship existed at the time of application, it followed that the issue of domestic violence did not arise: cf *Kaur v Minister for Immigration and Border Protection* [2014] FCA 1251.

- An application for special leave to appeal against the decision of Murphy J in *Kaur* was refused by the High Court on the basis that there was no reason to doubt the conclusion reached by Murphy J. See *Kaur v Minister for Immigration and Border Protection* [2015] HCASL 27.
- In *Minister for Immigration and Border Protection v Truong* [2016] FCAFC 54 (**Truong**) at [46], Tracey, Flick & Griffiths JJ quoted with approval the observations of Murphy J in *Kaur* at [43]–[44]. The Full Court must therefore be taken to have approved of *Hanna* at [23] and *Hossam* at [24].
- *Truong* at [46] was quoted by Judge Egan in *Le v Minister for Immigration* [2019] FCCA 3017 at [21] as authority for the proposition:

The Tribunal made clear and concise findings to the effect that the relationship between the applicant and the sponsor was not genuine. The Tribunal found that the spousal relationship had not been established. Having done so, the Tribunal did not then have to consider the issue of domestic violence which had been raised by the applicant.

- The only decision in which *El Jejeh* has been (relevantly) considered is *Sharma v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 3372 (**Sharma**). In that case, Judge Vasta held that he was bound to follow *El Jejeh*. See *Sharma* at [22]–[24], as follows:

22 For those reasons, I would normally say that, with greatest of respect to His Honour, that His Honour’s decision was plainly wrong on this particular point and refuse to follow it. However, I do not believe that in doing so that I would be following the principle of precedent. This Court, the Federal Circuit Court, is a Court of lower jurisdiction to that of the Federal Court, and the decision of His Honour, Wigney J, is the most recent decision from an appellate Court and, therefore, is binding upon this Court.

23 I am comforted in that view by what was said in the matter of *SZGME v Minister for Immigration and Citizenship* [2008] FCAFC 91. The Court there comprising Black CJ, Moore and Allsop JJ (as His Honour then was), made the following comments at paragraphs 42 and 43 of that decision;

42 In coming to that conclusion, the Federal Magistrate did not accept the conclusion of the single Judge in *SZECD* [2006] FCA 31; 150 FCR 53 that Li was inconsistent with *Yilmaz* and should not be followed. For the reasons we have given, we have come to the same conclusion. We should observe, however, that the principles of precedent required that the Federal Magistrate follow the decision in *SZECD*, being a decision of this Court in the appellate jurisdiction from the Federal Magistrates Court. We do not think that it was open to her Honour to regard what was said in *SZECD* as obiter. In this regard the observations of Lord Simon of Glaisdale in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at

478 are apposite, though his Lordship was in dissent. His Lordship said:

It is the duty of the subordinate court to give credence and effect to the [more recent] decision of the immediately higher court, notwithstanding that it may appear to conflict with the [earlier] decision of a still higher court. The decision of the still higher must be assumed to have been correctly distinguished (or otherwise interpreted) in the decision of the immediately higher court.

See also the valuable guidance in this respect in the judgment of Moffitt P in *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166, in particular at 177-180.

43 Before turning to the question of the exercise of discretion to withhold relief, it is also appropriate to say something about the approach taken by the single Judge in *SZECD*. The conclusion that a Full Court decision should not be followed should be one left to another Full Court, even if the judge is exercising the appellate jurisdiction of the Court. The Court in *Li* said that *Yilmaz* was distinguishable. That should have been sufficient for a single Judge, if the appeal were not to be referred to a Full Court for hearing.

24 I find myself in the position that I feel that I am bound to follow what Wigney J has said in *El Jejieh* (Supra). For that reason, I will allow the application. I will issue the writs.

- In *Singh v Minister for Immigration and Border Protection* [2021] FCA 480 (*Singh*), Besanko J followed the approach of Murphy J in *Kaur* and the Full Court in *Truong*, albeit without reference to *El Jejieh*.
- The decision of Wigney J in *El Jejieh* does not refer to any of *Kaur*, *Hanna*, *Hossam* or *Truong*. The Minister accepts that circumstance does not, of itself, permit this Court to disregard *El Jejieh* on the basis of the *per incuriam* doctrine. That is so because this Court is below the Federal Court in the judicial hierarchy and Wigney J in *El Jejieh* was sitting on appeal from this Court. See *SZGME* at [42]–[43], as follows:

42 In coming to that conclusion, the Federal Magistrate did not accept the conclusion of the single Judge in *SZECD* [2006] FCA 31; 150 FCR 53 that *Li* was inconsistent with *Yilmaz* and should not be followed. For the reasons we have given, we have come to the same conclusion. We should observe, however, that the principles of precedent required that the Federal Magistrate follow the decision in *SZECD*, being a decision of this Court in the appellate jurisdiction from the Federal Magistrates Court. We do not think that it was open to her Honour to regard what was said in *SZECD* as obiter. In this regard the observations of Lord Simon of Glaisdale in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at 478 are apposite, though his Lordship was in dissent. His Lordship said:

It is the duty of the subordinate court to give credence and effect to the [more recent] decision of the immediately higher court, notwithstanding that it may appear to conflict with the

[earlier] decision of a still higher court. The decision of the still higher must be assumed to have been correctly distinguished (or otherwise interpreted) in the decision of the immediately higher court.

See also the valuable guidance in this respect in the judgment of Moffitt P in *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166, in particular at 177-180.

43 Before turning to the question of the exercise of discretion to withhold relief, it is also appropriate to say something about the approach taken by the single Judge in *SZECD*. The conclusion that a Full Court decision should not be followed should be one left to another Full Court, even if the judge is exercising the appellate jurisdiction of the Court. The Court in *Li* said that *Yilmaz* was distinguishable. That should have been sufficient for a single Judge, if the appeal were not to be referred to a Full Court for hearing.

- In this regard, see also *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166 at 177; at [39]–[41]; *Algama v Minister for Immigration & Multicultural Affairs* [2001] FCAFC 1884; (2001) 115 FCR 253; *Gibbs v Hoama Mining NL* [2012] WADC 127 at [42]; *Sarina v O’Shannassy (No 2)* [2021] FCCA 338 at [20].
- The decision of Judge Vasta in *Sharma* does not refer to any of *Kaur*, *Hanna*, *Hossam* or *Truong*. This leaves scope for this Court to decline to follow *Sharma* as being given *per incuriam* or plainly wrong.
- The Applicant essentially submits that this Court is bound to follow *El Jejeh* and *Sharma*. See Applicant’s Outline at para 4 (vi). With respect, despite the Applicant’s reference to *SZGME v Minister for Immigration and Citizenship* [2008] FCAFC 91; (2008) 168 FCR 487 (*SZGME*) at [42]–[43], such an approach is contrary to the rules of precedent. See below.
- There are 3 possible “precedent approaches” this Court may follow in relation to *El Jejeh*:
 - (1) **Precedent Approach #1:** Follow the most recent decision of the Federal Court (whether constituted by a single judge or a Full Court). See *Mulyana v Minister for Immigration* [2009] FMCA 691 (*Mulyana*) at [35] (an appeal to the Full Federal Court was allowed, but not on this point: see *Mulyana v Minister for Immigration and Citizenship* [2010] FCAFC 24; (2010) 183 FCR 170).
 - (2) **Precedent Approach #2:** Follow the most recent decision of the Full Court of the Federal Court. See *SZGME* at [43].
 - (3) **Precedent Approach #3:** In the face of competing Federal Court authorities that, each in isolation from the others, would otherwise bind this Court, choose which of those competing authorities to follow. See *Baker v The Queen* [1975] AC 774 at 788D-F; *AIS17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 151 at [62] – [63]; *AGC17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 887 at [93]; *AKQ16 v Minister for Immigration* [2019] FCCA 90 at [40].

- As to *Precedent Approach #1*: Smith FM said in *Mulyana* at [35]:

It is clear that this Court is strictly bound to apply the opinions last given in the Federal Court on a legal point in the exercise of its appellate jurisdiction, whether by a single justice or a Full Court.
- On that approach, this Court should follow Besanko J in *Singh* at [23] in preference to *El Jejieh*.
- As to *Precedent Approach #2*: this Court should follow *Truong* at [46] in preference to *El Jejieh*.
- As to *Precedent Approach #3*: this Court should prefer the reasoning in *Truong* at [46], *Kaur* at [43] – [44], *Hanna* at [23], *Hossam* at [24] and *Singh* at [23] over that in *El Jejieh*. The weight of the reasoning in *El Jejieh* is undermined by the lack of reference to *Truong* at [46], *Kaur* at [43] – [44], *Hanna* at [23] and *Hossam*. By virtue of being a Full Court decision, *Truong* should carry the most weight in this Court.
- On the cases (other than *El Jejieh*) referred to above, the Tribunal was *not* obliged to consider family violence issues once the Tribunal reached the conclusion (which it did) that the relationship between the Applicant and the Sponsor did not satisfy paras (b), (c) & (d) of section 5F (2) of the Migration Act and hence could not satisfy clause 100.221 of Schedule 2 to the Migration Regs. See **2 CB 1526 [73] – [73]**.

Applicant's Reply Submissions

66 The applicant's reply submissions relevantly provide:

- On 24 May 2021, the Minister filed and served an outline of submissions. This reply seeks to deal with the following points raised in the Minister's outline:
 - i. Whether *Kaur*, *Truong*, *Hanna*, *Hossam* and/or *Singh* provides an answer to the question of whether cl 100.221(4)(b) of Sch 2 of the *Migration Regulations 1994* (Cth) (**Regulations**) requires a decision-maker to make an assessment of whether there was a genuine spousal relationship prior to the cessation of the relationship; and
 - ii. Whether the Court, consistent with the principle of *stare decisis*, is at liberty to depart from *El Jejieh*.

The first issue

- ***Kaur [v Minister for Immigration and Border Protection [2014] FCA 1251]*** was a judgment dealing with an appeal from a judgment of the Federal Circuit Court of Australia (FCCA) dismissing an application for judicial review of a decision by the Tribunal to refuse to grant the appellant a Partner (Subclass 820) visa. The Tribunal concluded, correctly, that the appellant had to satisfy the criterion contained at cl 820.211(2) of Schedule 2 to the Regulations. That criterion required the appellant to demonstrate that she was the spouse of the sponsor, meaning in simple terms that they were in a genuine spousal relationship.

- Two things should be noted about cl 820.211. Firstly, it is required to be satisfied by an applicant at the time of application. Secondly, while it does have family violence related criteria, these criteria are only capable of satisfaction by an applicant who entered Australia on a Prospective Marriage (Subclass 300) visa. The appellant in *Kaur* was unable to avail herself of those criteria.
- The claim of family violence made by the appellant in *Kaur* could only be relevant to **the time of decision criterion** contained at cl 820.221(3) of Sch 2 to the Regulations. As the Court held, uncontroversially, there is little utility in assessing a time of decision criterion if there is a time of application criterion that the appellant did not meet. It was entirely right and proper for the Tribunal in *Kaur* to assess whether there was a genuine spousal relationship at the time of application before assessing the family violence claims which were only relevant to a time of decision criterion.
- In this case, the Applicant was applying for a Partner (Subclass 100) visa **which has no time of application criteria**. This is not a case analogous to *Kaur* where there was a separate time of application criterion requiring an assessment of whether the Applicant was in a genuine spousal relationship with the sponsor. As such, it is submitted that *Kaur* cannot provide an answer, by analogy or otherwise, to the question of whether cl 100.221(4)(b) of Sch 2 of the Regulations requires a decision-maker to make an assessment of whether there was a genuine spousal relationship prior to the cessation of the relationship.
- [*Minister for Immigration and Border Protection v Truong* [[2016] FCAFC 54] was an appeal by the Minister of a judgment of the FCCA upholding an application for judicial review of a decision by the Tribunal to refuse to grant the respondent a Partner (Subclass 801) visa.
- It is important to understand the FCCA judgment in order to understand the appeal. Ground 1 of the amended application before the FCCA alleged that the Tribunal made a jurisdictional error by failing to have regard to 3 pages of a domestic violence order (**DVO**) in its assessment of whether the applicant had been in a genuine spousal relationship with the sponsor. The Tribunal could not have considered those 3 pages due to a photocopying error. Included in those pages was evidence about the residential address of the applicant and the sponsor which had tended to contradict a finding made by the Tribunal that the applicant and the sponsor had never lived together. This adverse finding was also used by the Tribunal to impugn the applicant's credit. The learned primary judge found that the Tribunal failed to consider the 3 pages, and that the 3 pages contained evidence material to the Tribunal's decision. Ground 1 of the amended application was upheld.
- Although it is not clear on the face of the FCCA's judgment which criterion the Tribunal found the applicant did not meet for the grant of the Partner (Subclass 801) visa, it is clear from the appeal that it was cl 801.221(6) of sch 2 of the Regulations. It is accepted that cl 801.221(6) is not relevantly different to cl 100.221(4).
- The Minister's appeal from the FCCA's judgment was dismissed. Ground 1 complained that the learned primary judge had denied the Minister's counsel an opportunity to be heard during the hearing. Ground 2 complained that the learned primary judge erred in finding the 3 pages of the DVO were material to the outcome of the Tribunal's review as there was 'virtually identical'

evidence before the Tribunal. Ground 3 complained that the learned primary judge failed to have regard to s 5F of the *Migration Act 1958* (Cth) (**Act**) and misconstrued s 65 of the Act. Grounds 1 and 2 are not relevant for present purposes, both being resolved by the Full Court on factual bases.

- Ground 3 essentially complained that even if the Tribunal had considered the missing 3 pages of the DVO and even if those pages contained information relevant to its task which was not otherwise before it, that, having regard to the Tribunal's other findings and the statutory context in which it was operating, consideration of those pages could not have made a difference to the outcome of the review. Ultimately, the Full Court found that, although the 3 pages only tended to prove a single issue among many which the Tribunal found against the respondent, the resulting adverse finding as to credit permeated the entire decision and, therefore, it could not be said that the omission of the 3 pages was immaterial to the review.
- The question of whether the analogous provision, cl 801.221(6)(b), to cl 100.221(4)(b) of Sch 2 of the Regulations requires a decision-maker to make an assessment of whether there was a genuine spousal relationship prior to the cessation of the relationship was never put in issue either at first instance or on appeal in *Truong*. The Full Court seems to cite *Kaur* at [46] for the proposition that the Tribunal was required to assess whether there was a genuine spousal relationship, even though as discussed above it does not stand for this proposition. At best, the Full Court assumes that cl 801.221(6)(b) required an assessment of whether there was a genuine spousal relationship. In the Applicant's submission this assumption is *obiter* rather than *ratio*.
- **Hanna [v Minister for Immigration and Border Protection [2016] FCA 282]** was an appeal by the appellant of a judgment of the FCCA dismissing an application for judicial review of a decision by the Tribunal to refuse to grant the appellant a Partner (Subclass 100) visa. It is the only truly comparable case to this one.
- The important reasoning is at [24], which provides.

24. The appellant otherwise contended by reference to numerous documents that his relationship with the sponsor had been a genuine spousal relationship involving mutual commitment at one time, so the Tribunal should have considered his family violence claims. These contentions, however, impermissibly seek to re-agitate the merits of the matter and cannot provide a basis on which to interfere with the decision of the Tribunal. The primary judge was also correct to reach the same conclusion.
- Like *Truong*, *Hanna* cites *Kaur* for a proposition that, for the reasons outlined above, it does not stand for. It is accepted, however, that *Hanna* does stand for the proposition that cl 100.221(4)(b) of Sch 2 of the Regulations requires a decision-maker to make an assessment of whether there was a genuine spousal relationship prior to the cessation of the relationship.
- **Hossam [v Minister for Immigration and Border Protection [2016] FCA 1161]** was an appeal by the appellant of a judgment of the FCCA dismissing an application for judicial review of a decision by the Tribunal to refuse to grant the appellant a Partner (Subclass 820) visa. Like *Kaur*, the appellant there did not satisfy the time of application criteria, so there was no utility in

making an assessment of family violence claims that were time of decision. *Hossam* does not stand for the proposition that cl 100.221(4)(b) of Sch 2 of the Regulations requires a decision-maker to make an assessment of whether there was a genuine spousal relationship prior to the cessation of the relationship.

- ***Singh* [v Minister for Immigration and Border Protection [2021] FCA 480]** was an appeal by the appellant of a judgment of the FCCA dismissing an application for judicial review of a decision by the Tribunal to refuse to grant the appellant a Partner (Subclass 820) visa. Like *Kaur* and *Hossam*, the Tribunal was not satisfied that appellant satisfied the time of application criterion for the grant for the visa.
- The Court's conclusion at [23] by reference to *Kaur* and *Truong* was correct. It provides:

23 In my opinion, there is no error in the reasons of the Federal Circuit Court. As the Federal Circuit Court held, the Tribunal's conclusion that there was no de facto relationship did not involve jurisdictional error. In those circumstances, the Tribunal was not bound to consider the issue of family violence (*Kaur v Minister for Immigration and Border Protection* [2014] FCA 1251 at [43]–[44] per Murphy J; *Minister for Immigration and Border Protection v Truong* [2016] FCAFC 54 at [46] per Tracey, Flick and Griffiths JJ). In any event, as the Federal Circuit Court held, the Tribunal's conclusion that there was no evidence and no claim made by the appellant of family violence has not been shown to involve error.

- Given that the appellant had failed to satisfy the time of application criterion of being in a genuine de facto relationship, there was no need for the Tribunal to assess his family violence claims. *Singh* does not stand for the proposition that cl 100.221(4)(b) of Sch 2 of the Regulations requires a decision-maker to make an assessment of whether there was a genuine spousal relationship prior to the cessation of the relationship.

Issue 2 – what does stare decisis require?

- There is only one answer to the question of what stare decisis requires and that is that the Court is bound to follow the last judgment of a higher court on this subject. So much was held by Black CJ and Allsop J in *SZGME* at [42]. The Minister misstates the position at [64(2)] of his submissions – that is not a precedent approach authorized by *SZGME* (at [43] Black CJ and Allsop J were merely criticizing the approach taken by a single judge exercising the appellate jurisdiction of the Federal Court).
- From the FCCA's point of view, there is no difference if the Federal Court sitting as an intermediate appellate court is comprised by 1 judge, 3 judges or 5 judges. Either way it is an intermediate appellate court exercising the full authority of that Court.
- Assuming contrary to the Applicant's submissions that the assumption in *Truong* about the need for the Tribunal to assess whether there was a genuine spousal relationship was part of the *ratio* of that case, there is an interesting debate about whether that bound Wigney J. However, even if Wigney J was so bound, that is not a question for the FCCA to determine. *El Jeje* is the last judgment by an intermediate appellate court on the subject matter of this application. The FCCA is required to assume, in the event there is any

inconsistency with the *ratio* of *Truong*, that *Truong* was correctly distinguished or interpreted.

- *Sharma* was also correctly decided and should be followed. Contrary to the Minister’s submissions, Judge Vasta did indeed consider *Kaur* and *Truong*.
- While *Singh* was handed down since *Sharma*, that is the only difference in the position and for the reasons outlined above *Singh* is distinguishable.

67 For the reasons that follow, the Court accepts the applicant’s submissions.

68 Relevantly, as stressed by the applicant, this Court is bound to follow the last judgment of a higher court on this subject. The Court agrees that there is no difference if the Federal Court, sitting as an intermediate appellate court, is comprised of one, three or five judges. In each instance, it is an intermediate appellate court exercising the full authority of that court. As such, the Court here is bound by the decision in *El Jejeh*. While the decision in *Singh* postdates that decision, *Singh* does not bind this Court.

Competing authorities

El Jejeh

69 In *El Jejeh*, the appellant relevantly lodged a combined application for a provisional partner visa (subclass 309) and permanent partner visa (subclass 100): *El Jejeh* at [16].

70 A subclass 100 visa contains only “time of decision” criteria. That is, there are no criteria which must be met at the “time of application”: cl 100.21 of the Regulations. The time of application criteria is assessed at the time of assessing the application for the subclass 309 visa.

71 The applicant must then demonstrate that they continue to hold the subclass 309 visa at the time of decision relevant to the subclass 100 visa.

72 The relevant provisions provide as follows:

100.21—[No criteria to be satisfied at the time of application]

100.22—Criteria to be satisfied at time of decision

100.221

- (1) The applicant meets the requirements of subclause (2), (2A), (3), (4) or (4A).
- (2) The applicant meets the requirements of this subclause if:
 - (a) the applicant is the holder of a Subclass 309 (Partner (Provisional)) visa; and
 - (b) the applicant is the spouse or de facto partner of the sponsoring partner; and

- (c) subject to subclauses (5), (6) and (7), at least 2 years have passed since the application was made.

...

- (4) The applicant meets the requirements of this subclause if:
 - (a) the applicant first entered Australia as the holder of a Subclass 309 (Partner (Provisional)) visa and continues to be the holder of that visa; and
 - (b) the applicant would meet the requirements of subclause (2) or (2A) except that the relationship between the applicant and the sponsoring partner has ceased; and
 - (c) after the applicant first entered Australia as the holder of the visa mentioned in paragraph (a)—either or both of the following circumstances applies:
 - (i) either or both of the following:
 - (A) the applicant;
 - (B) a member of the family unit of the sponsoring partner or of the applicant or of both of them;
- has suffered family violence committed by the sponsoring partner;

...

73 In *El Jejieh*, Wigney J, sitting as a single judge of the Federal Court stated as follows in relation to cl 100.221(4) of the Regulations (emphasis added):

- 202. This ground of appeal raises an issue that was not ventilated before the primary judge. Mr El Jejieh was given leave to raise it on appeal notwithstanding. It hinges on the proper construction of the criterion in cl 100.221(4) of Sch 2 to the Regulations.
- 203. The relevant criteria for the grant of a Subclass 100 visa were outlined earlier in these reasons. One way that Mr El Jejieh was able to meet the criteria was to establish that he: was the holder of a Subclass 309 visa; was the spouse of his sponsoring partner; and two years had passed since he applied for the visa: cl 100.221(2) Another way he was able to meet the criteria was to establish that he: first entered Australia as the holder of a Subclass 309 visa; continued to hold that visa; would meet the requirements of cl 100.221(2) except that the relationship between him and his sponsoring partner had ceased; and he had suffered family violence committed by the sponsoring partner: cl 100.221(4).
- 204. It was tolerably clear that Mr El Jejieh was pursuing his review application before the Tribunal on the basis of cl 100.221(4). He had provided material to the Tribunal which included claims that he had suffered family violence committed by Ms Maarabani. The Tribunal was aware of those claims and asked Mr El Jejieh about them during the hearing. The Tribunal, however, made no findings concerning those claims. It found that it did not need to make any such findings because it found that there had never been a genuine spousal relationship between Mr El Jejieh and Ms Maarabani. In so finding, the Tribunal misconstrued the requirements of cl 100.221(4) and, as a result, failed to complete the exercise of its review jurisdiction.

205. **The requirements of cl 100.221(4) have just been set out. They do not include a requirement that the applicant demonstrate that the applicant's relationship with his or her sponsoring partner was a genuine relationship. The applicant does have to establish that he or she entered Australia as the holder of a subclass 309 visa and continued to hold that visa. A criterion for the grant of a subclass 309 visa is that the applicant was, at the time of application and decision, a spouse of, relevantly, an Australian citizen. Thus, if the applicant establishes that he or she held a Subclass 309 visa at the time they entered Australia and continued to hold that visa, in a sense that demonstrates that they were the spouse of an Australian citizen. But they do not need to demonstrate that fact separately. They need only demonstrate that they held and continue to hold a Subclass 309 visa.**
206. It might perhaps be argued that the requirement, in cl 100.221(4)(b), which involves the cessation of the relationship between the applicant and the sponsoring partner, implies that there was a relationship in the first place. For the reasons already given, however, the relevant requirement in cl 100.221(4) is that the applicant held and continued to hold a Subclass 309 visa, not that there was a relationship. It might perhaps be added, in this context, that if the Minister became aware of information that suggested that the applicant for a Subclass 100 visa who held a Subclass 309 visa was never in a genuine relationship with his or her spouse, it would most likely be open to the Minister to cancel the applicant's Subclass 309 visa. It would then follow that the applicant would not meet the criteria for the grant of a Subclass 100 visa. That did not, however, occur in this case.
207. Mr El Jejeh entered Australia as the holder of a Subclass 309 visa and continued to hold that visa at the time of his review application. While his relationship with Ms Maarabani had ceased by that time, he claimed that he met cl 100.221(4) because he suffered family violence committed by Ms Maarabani. The Tribunal was required to consider that claim. Its failure to do so was amounted to a failure of it to exercise its review jurisdiction.
208. Grounds 9 of Mr El Jejeh's amended notice of appeal is accordingly made out.

74 The Tribunal in the matter now before this Court took the same approach (ultimately found to be incorrect) as the Tribunal in *El Jejeh*.

75 Relevantly, here the Tribunal confirmed that the applicant returned to Australia as the holder of a subclass 309 visa on 18 June 2016 (at [13]) and lodged an application for the grant of her permanent (subclass 100) visa on the basis that her marriage had ended as a result of family violence (at [15]).

76 Following the reasoning of Wigney J in *El Jejeh* (at [205]), as the applicant had established she held a subclass 309 visa at the time she entered Australia, and continued to hold that visa, the applicant had already demonstrated that she was the spouse of an Australian citizen. The applicant did "not need to demonstrate that fact separately".

77 The Tribunal in this case has thus erred in the manner described in *El Jejeh* (at [204]) by misconstruing the requirements of cl 100.221(4) of the Regulations and has, as a result, “failed to complete the exercise of its review jurisdiction”.

Singh

78 In *Singh*, the appellant applied for a temporary Class UK visa, which, at the time of application, contained only the subclass 820 visa: *Singh* at [2]-[3].

79 A subclass 820 visa has both time of application *and* time of decision criteria which must be met. The appellant in *Singh* was refused the visa “on the basis that he did not satisfy cl 820.211(2)(a) (at the time of the application) or cl 820.221(1) (at the time of decision)”: *Singh* at [4].

80 There are two separate sets of criteria that must be met in the case of a subclass 820 visa - the criteria at the time of the application pursuant to cl 820.211(2)(a) and *further* criteria to be met the time of the decision pursuant to cl 820.221(1) of the Regulations.

81 The relevant legislative provisions provide as follows:

820.21—Criteria to be satisfied at time of application

820.211

- (1) The applicant:
 - (a) is not the holder of a Subclass 771 (Transit) visa; and
 - (b) meets the requirements of subclause (2), (5), (6), (7), (8) or (9).
- (2) An applicant meets the requirements of this subclause if:
 - (a) the applicant is the spouse or de facto partner of a person who:
 - (i) is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; and
 - (ii) is not prohibited by subclause (2B) from being a sponsoring partner;

...

820.22—Criteria to be satisfied at time of decision

820.221

- (1) In the case of an applicant referred to in subclause 820.211(2), (5), (6), (7), (8) or (9), the applicant either:
 - (a) continues to meet the requirements of the applicable subclause; or
 - (b) meets the requirements of subclause (2) or (3).
- (2) An applicant meets the requirements of this subclause if the applicant:
 - (a) would continue to meet the requirements of subclause 820.211(2),

- (5) or (6) except that the sponsoring partner has died; and
 - (b) satisfies the Minister that the applicant would have continued to be the spouse or de facto partner of the sponsoring partner if the sponsoring partner had not died; and
 - (c) has developed close business, cultural or personal ties in Australia.
- (3) An applicant meets the requirements of this subclause if:
- (a) the applicant would continue to meet the requirements of subclause 820.211(2), (5) or (6) except that the relationship between the applicant and the sponsoring partner has ceased; and
 - (b) either or both of the following circumstances applies:
 - (i) either or both of the following:
 - (A) the applicant;
 - (B) a dependent child of the sponsoring partner or of the applicant or of both of them;
- has suffered family violence committed by the sponsoring partner;

...

82 In *Singh*, Besanko J determined that, where the first set of criteria has not been met, there is no need for a Tribunal to go on to consider the further criteria (emphasis added):

18 The primary judge said that, in those circumstances, he was not persuaded that the appellant was able to demonstrate that he had been the subject of any procedural unfairness or that he was unable to present his case. His Honour noted that the Tribunal was required to consider only the application made by the appellant and the arguments in support thereof clearly articulated by him. The primary judge concluded that **there was no evidence to indicate that the appellant advanced any submissions regarding his exposure to family violence** or that this was a topic which emerged from his submissions to the Tribunal. **The Tribunal had addressed the correct question.**

19 The primary judge said that, **in any event, it was a necessary precursor before considerations of family violence could be considered that the Tribunal was persuaded that there was a de facto relationship which was terminated by family violence.** The primary judge said that the factual findings by the Tribunal that there was no de facto relationship and that, in any event, the appellant had not raised issues of family violence, were factual findings reasonably open to the Tribunal and that it was not open to the Federal Circuit Court to substitute its own findings in relation to them. Nor was it open to the Federal Circuit Court to consider the appellant's current claims regarding his exposure to family violence.

...

23 In my opinion, there is no error in the reasons of the Federal Circuit Court. As the Federal Circuit Court held, the Tribunal's conclusion that there was no de facto relationship did not involve jurisdictional error. **In those circumstances, the Tribunal was not bound to consider the issue of family violence** (*Kaur v Minister for Immigration and Border Protection* [2014] FCA 1251 at [43]–[44] per Murphy J; *Minister for Immigration and Border Protection v Truong* [2016] FCAFC 54 at [46] per Tracey, Flick and Griffiths).

JJ). In any event, as the Federal Circuit Court held, the Tribunal's conclusion that there was no evidence and no claim made by the appellant of family violence has not been shown to involve error.

83 The Tribunal in *Singh* was not satisfied that the appellant satisfied cl 820.211(2)(a) of the Regulations *at the time of the application* (at [4]). As the appellant in *Singh* had failed to establish the existence of a genuine de facto relationship at the time of application, there was no need for the Tribunal to continue to assess his claims of family violence to satisfy cl 820.221 of the Regulations *at the time of decision*.

84 In effect, if at the time of the application there was no evidence the parties were in a relationship, that relationship could not have subsequently been terminated by family violence.

Does Singh bind this Court in relation to this matter?

85 The legislative provisions in *Singh* differ to those in *El Jejeh* (and, importantly, those relevant to this matter).

86 As outlined above, in *El Jejeh* (and in the present case), the “time of application criteria” for a subclass 100 visa was assessed at the time of the granting of the provisional (subclass 309) visa. If it could be established that the appellant held the subclass 309 visa at the time of entering Australia and the appellant continued to hold the visa, they had already effectively established that they were the spouse of an Australian citizen and did not need to separately demonstrate that fact.

87 The legislation relevantly states, at 100.21 of the Regulations, that there is “no criteria to be satisfied at the time of application”.

88 This is not the case in the legislation applicable in *Singh*.

89 In *Singh*, the legislation requires that, *at the time of application*, the existence of a genuine relationship must be established. The issue of family violence is then assessed *at the time of decision*. In circumstances where the existence of a genuine relationship has *not* been established *at the time of application*, there is no need for the Tribunal to go on to consider the issue of any relevant family violence *at the time of decision*.

90 On the basis of these differing legislative provisions, this Court is of the view that *Singh* is distinguishable on the facts of this case. *El Jejeh*, on the other hand, is directly on point. The

Court is thus bound by that decision and, accordingly, applies it in determining the issues raised in the current matter.

Sharma

91 His Honour Judge Vasta was faced with a similar set of circumstances in *Sharma v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs* [2020] FCCA 3372.

92 Relevantly, His Honour stated:

22 ...This Court, the Federal Circuit Court, is a Court of lower jurisdiction to that of the Federal Court, and the decision of His Honour, Wigney J, is the most recent decision from an appellate Court and, therefore, is binding upon this Court.

23. I am comforted in that view by what was said in the matter of *SZGME v Minister for Immigration and Citizenship* [2008] FCAFC 91. The Court there comprising Black CJ, Moore and Allsop JJ (as His Honour then was), made the following comments at paragraphs 42 and 43 of that decision;

42 In coming to that conclusion, the Federal Magistrate did not accept the conclusion of the single Judge in *SZECD* [2006] FCA 31; 150 FCR 53 that Li was inconsistent with *Yilmaz* and should not be followed. For the reasons we have given, we have come to the same conclusion. We should observe, however, that the principles of precedent required that the Federal Magistrate follow the decision in *SZECD*, being a decision of this Court in the appellate jurisdiction from the Federal Magistrates Court. We do not think that it was open to her Honour to regard what was said in *SZECD* as obiter. In this regard the observations of Lord Simon of *Glaisdale in Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at 478 are apposite, though his Lordship was in dissent. His Lordship said:

It is the duty of the subordinate court to give credence and effect to the [more recent] decision of the immediately higher court, notwithstanding that it may appear to conflict with the [earlier] decision of a still higher court. The decision of the still higher must be assumed to have been correctly distinguished (or otherwise interpreted) in the decision of the immediately higher court.

See also the valuable guidance in this respect in the judgment of Moffitt P in *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166, in particular at 177-180.

43 Before turning to the question of the exercise of discretion to withhold relief, it is also appropriate to say something about the approach taken by the single Judge in *SZECD*. The conclusion that a Full Court decision should not be followed should be one left to another Full Court, even if the judge is exercising the appellate jurisdiction of the Court. The Court in *Li* said that *Yilmaz* was distinguishable. That should have been sufficient for a single Judge, if the appeal were not to be referred to a Full Court for hearing.

93 His Honour, Judge Vasta, considered himself bound by *El Jejeh*. This Court finds itself similarly bound. While *Singh* may post-date *El Jejeh* as “the most recent Federal Court authority”, for the reasons outlined above, *Singh* does not apply to the facts of this case.

94 Further, the Court rejects any suggestion that it should not adopt the reasoning in *El Jejeh* because that decision is “plainly wrong”. It is clear from the arguments advanced in this case that the decision in *El Jejeh* has not been “well received” in some quarters. This does not mean, however, that the reasoning provided in that case is “clearly wrong”. *El Jejeh* could have been appealed. It was not. This Court should not be asked to do what could have been done through the appellate process. That process exists for a reason and will not be ignored here.

95 The reasoning in *El Jejeh* is binding and is, accordingly, followed. The Tribunal in this case has erred in the manner described in *El Jejeh* (at [204]) by misconstruing the requirements of cl 100.221(4) of the Regulations and has, as a result, “failed to complete the exercise of its review jurisdiction”.

CONCLUSION

96 The applicant’s amended judicial review application has identified jurisdictional error.

97 The Tribunal’s decision will be set aside and the matter will be remitted for rehearing.

I certify that the preceding ninety-seven (97) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Kendall.

Associate:

Dated: 21 July 2021